U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0479 BLA

CARLIE MIRACLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CYPRUS CUMBERLAND COAL CORPORATION	)	DATE ISSUED: 07/20/2016
	)	
and	)	
	)	
AETNA INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Mark L. Ford (Ford Law Offices, PLLC), Harlan, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2010-BLA-5553) of Administrative Law Judge Scott R. Morris (the administrative law judge) rendered on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge determined that the claim was timely filed, and credited claimant with sixteen years of coal mine employment in dust conditions substantially similar to those in an underground mine. The administrative law judge adjudicated the claim pursuant to the regulations at 20 C.F.R. Parts 718 and 725, and found that the newly-submitted evidence was sufficient to establish total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[2] Considering the entire record, the administrative law judge determined that the new evidence outweighed the earlier evidence, and found that claimant invoked the presumption of total disability due to pneumoconiosis at Section

[1] Claimant's initial claim for benefits, filed on March 16, 1990, was finally denied by the district director on August 7, 1990 for failure to establish any element of entitlement. Director's Exhibit 1.

Claimant's second claim, filed on April 14, 1994, was denied by Administrative Law Judge Edward Terhune Miller on November 12, 1997, who found that claimant failed to establish any element of entitlement. Director's Exhibits 1, 2.

Claimant's third claim, filed on September 29, 2000, was finally denied on December 18, 2002 by Administrative Law Judge Joseph E. Kane, who found that while claimant established the existence of pneumoconiosis he did not establish a "material change in conditions" since the denial of his last claim. Director's Exhibits 1, 3.

Claimant's fourth claim, filed on August 11, 2004, was denied on April 26, 2007 by Administrative Law Judge Robert D. Kaplan, who found that claimant failed to establish any element of entitlement. Director's Exhibit 4. Claimant filed the current claim on June 29, 2009. Director's Exhibit 6.

[2] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co*., 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3).

411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] Finding that employer failed to establish rebuttal of the presumption, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's determination that claimant's surface mine employment occurred in dust conditions substantially similar to those in an underground mine, entitling claimant to invocation of the Section 411(c)(4) presumption. Employer also challenges the administrative law judge's findings on rebuttal. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption. While employer does not dispute that claimant is disabled from a pulmonary perspective and that he worked over fifteen years in combined underground and surface mining, employer asserts that claimant failed to prove that his working conditions at the surface were substantially similar to dust conditions in an underground mine. Employer generally argues that "mere evidence of some dust exposure is insufficient to constitute 'substantially similar' dust exposure conditions," and that the record indicates only that claimant was "on occasion exposed to

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years in underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[4] We affirm, as unchallenged on appeal, the administrative law judge's determination that the claim was timely filed, and that claimant established sixteen years of coal mine employment, the existence of a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b), and a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 7; Decision and Order at 8.

dust in his surface mining work." Employer's Brief at 3-4. Employer's argument lacks merit.

To invoke the Section 411(c)(4) presumption, a miner must establish at least fifteen years of "employment in one or more underground coal mines," or of "employment in a coal mine other than an underground mine," in conditions "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). In order for a surface miner to prove that his or her work conditions were substantially similar to those in an underground mine, the implementing regulation requires that claimant demonstrate that he was "regularly exposed to coal mine dust while working there." 20 C.F.R. §718.305(b)(2);[6] *see Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663, BLR (6th Cir. 2015); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90, 25 BLR 2-633, 2-641-43 (6th Cir. 2014); *Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 1344, 25 BLR 2-549, 2-566 (10th Cir. 2014)(noting that the clarified standard under the revised regulations at Section 718.305(b)(2) provides sufficient guidance to measure similarity).

In this case, the administrative law judge acknowledged that claimant engaged in "some" underground mining, but that he "mostly worked at the surface." Decision and Order at 4; Claimant's Deposition at 4-5; 2007 Hearing Transcript at 10-11. The administrative law judge reviewed claimant's deposition testimony, that he worked underground as a driller for one or two years and then worked on the surface, operating a bulldozer and other heavy equipment, and conducting reclamation work. Decision and Order at 5, 13. The administrative law judge noted that claimant's work as a bulldozer operator entailed pushing raw coal to the washer and loading the coal onto trains, and that his reclamation work exposed him to coal mine dust because he was required to "move the coal out of the way as part of the reclamation." *Id*.; Claimant's Deposition at 7, 9. Claimant testified that he operated bulldozers with open cabs and that the dust level was comparable to, or worse than, his underground mining work, because "it was hard sometimes to even see what you [were] doing," and that he was "always breathing in all this dust." *Id*.; Claimant's Deposition at 7-10; Director's Exhibit 4-58. The administrative law judge noted claimant's explanation that his work loading coal onto trains took place next to the tipple, which was a very dusty location, and that the reclamation work during his last three years of employment had "about the same" dust levels as he experienced throughout the rest of his coal mining career. Decision and Order at 5, 13; Claimant's Deposition at 8, 10-11. Based on his consideration of this uncontradicted evidence, the administrative law judge permissibly found that claimant's

[6] Section 718.305(b)(2) provides that "the conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal mine dust while working there." 20 C.F.R. §718.305(b)(2).

work on the surface took place in dust conditions comparable to those in an underground mine, and we affirm his finding as supported by substantial evidence. *See Sterling*, 762 F.3d at 489-90, 25 BLR at 2-641-43. Consequently, we affirm the administrative law judge's finding that claimant established at least fifteen years of qualifying coal mine employment, and was entitled to invocation of the Section 411(c)(4) presumption.

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis, or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii).

Employer challenges the administrative law judge's weighing of the evidence in finding that employer failed to rebut the presumed facts of legal pneumoconiosis and disability causation pursuant to Section 411(c)(4). Employer asserts that the administrative law judge erred in crediting the opinion of Dr. Baker and in discounting the opinions of Drs. Castle and Jarboe, arguing that the administrative law judge "ignored" portions of the doctors' opinions and the explanations for their conclusions. Employer also maintains that the administrative law judge failed to evaluate all relevant evidence in determining claimant's smoking history, and that he should have credited the sixty to seventy-five pack-year history noted by Dr. Barry, claimant's treating physician. Employer's Brief at 4-7. Employer's arguments lack merit.

The administrative law judge accurately summarized the conflicting medical opinions of record and the bases for the physicians' conclusions, and determined that Dr. Baker diagnosed legal pneumoconiosis,[7] whereas Drs. Jarboe and Castle opined that there is insufficient evidence of legal pneumoconiosis and that no part of claimant's obstructive impairment is due to coal dust exposure.[8] Decision and Order at 18-23, 30-32, 35;

[7] Legal pneumoconiosis refers to "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The regulation also provides that "a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[8] The administrative law judge also considered the opinions of Drs. Moore and Barry, but determined that they were entitled to diminished weight. Decision and Order at 19-20, 31, 34-35; Director's Exhibits 12, 17; Claimant's Exhibit 1. As no party alleges error with respect to these findings, they are affirmed. *See Skrack*, 6 BLR at 1-711.

Director's Exhibits 13, 16; Employer's Exhibits 2, 3. Specifically, Dr. Jarboe diagnosed chronic asthmatic bronchitis, explaining that claimant's spirometric results, while not valid to assess ventilatory function, demonstrate a pattern of airflow obstruction consistent with cigarette smoking and hyperreactive airways. He ruled out coal dust exposure as a contributing cause, because claimant's spirometric testing results show a disproportionate reduction of FEV1 compared to FVC, which Dr. Jarboe determined to be the "hallmark of the functional abnormality seen in cigarette smoking and/or asthma." Director's Exhibit 16 at 5-6. Similarly, Dr. Castle noted that while the pulmonary function studies he reviewed were invalid for accurate interpretation, claimant has a degree of airway obstruction that is wholly attributable to his "very long and extensive" smoking history of seventy-five pack-years. He further indicated that some of claimant's symptoms could be due to his treatment for lymphoma. Employer's Exhibit 3 at 20.

The administrative law judge acted within his discretion in concluding that the opinions of Drs. Jarboe and Castle were insufficiently reasoned, as he determined that both physicians failed to adequately address how sixteen years of coal dust exposure could be excluded as a contributing or aggravating factor to the miner's obstructive impairment. Decision and Order at 34-36; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). The administrative law judge additionally found that Dr. Castle's opinion was not well-documented, as the physician performed a record review in 2014, but based his conclusions on the objective testing and his own 2003 and 2005 reports from claimant's earlier claims, rather than any medical reports and testing obtained in the current claim. Decision and Order at 32, 35-36; *see generally Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988), *citing Coffey v. Director, OWCP*, 5 BLR 1-404 (1982) (the evidence must address the relevant inquiry, *i.e.*, the miner's respiratory or pulmonary status at the time of the hearing). Further, the administrative law judge determined that Dr. Jarboe never indicated the smoking history on which he relied, and based his conclusions on invalid test results, while Dr. Castle based his opinion on an exaggerated smoking history of at least seventy-five pack-years. Decision and Order at 31-32; 34-36; *see Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Street v. Consolidation Coal Co.*, 7 BLR 1-65, 1-67 (1984). Contrary to employer's argument, the administrative law judge was not required to rely on the smoking history recorded by one of claimant's treating physicians, but acted within his discretion as trier-of-fact in determining that claimant had a thirty-one pack-year smoking history after reviewing the various smoking histories set forth in the record.[9] Decision and Order at 5-

[9] The administrative law judge reviewed the various smoking histories recorded by the physicians in claimant's current and prior claims, and found that the smoking estimations of record indicate a smoking history of between ten and seventy-five pack-years. Decision and Order at 5-6.

6. As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that the opinions of Drs. Jarboe and Castle are insufficient to rebut the presumed fact of legal pneumoconiosis. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge permissibly determined that the same reasons that he provided for discrediting the opinions of Drs. Jarboe and Castle on the issue of pneumoconiosis also undercut their opinions that no part of claimant's disabling respiratory or pulmonary impairment was caused by pneumoconiosis. Decision and Order at 35-36; *see* 20 C.F.R. §718.305(d)(1); *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1070, 25 BLR 2-431, 25 BLR 2-444 (6th Cir. 2013); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 25 BLR 2-453 (6th Cir. 2013); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). As substantial evidence supports the administrative law judge's findings, we affirm his conclusion that the opinions of Drs. Jarboe and Castle are insufficient to rebut the presumed fact of disability causation.[10] 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(ii). Consequently, we affirm the administrative law judge's findings that employer failed to rebut the Section 411(c)(4) presumption and that claimant is entitled to benefits.

In determining that claimant had a smoking history of thirty-one pack-years, the administrative law judge noted that Dr. Dahhan referenced a history of one pack of cigarettes daily for ten years in 2005, Director's Exhibit 4-12, and Dr. Jarboe recorded a history of one or two hand-rolled cigarettes per week in 2009, but stated that claimant's carboxyhemoglobin values were compatible with a smoking history of almost a pack of cigarettes per day. Director's Exhibit 16. The administrative law judge determined that Drs. Baker and Castle recorded a thirty-one year smoking history in 2005 and Dr. Baker adopted this figure in his 2009 deposition. Director's Exhibits 4-210, 4-323, 4-373; Employer's Exhibits 2 at 6-7, 3. The administrative law judge concluded that Dr. Barry's estimation of "greater than 75 pack years" and "60 pack years" in his 2011 treatment note is a high outlier in comparison to the preponderance of the smoking histories recorded in the record. Decision and Order at 5-6; Claimant's Exhibit 1.

[10] Because it is employer's burden to affirmatively rebut the Section 411(c)(4) presumption, we decline to address employer's allegation that the administrative law judge erred in according "normal probative weight" to Dr. Baker's findings of legal pneumoconiosis and total disability due to pneumoconiosis. Decision and Order at 30, 35; *see Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1277 (1984).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge